

# **Last Attorney to the Jury Box Is a Rotten Egg: Overcoming Psychological Hurdles in the Order of Presentation at Trial**

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## **I. INTRODUCTION**

More than one hundred years ago, the United States Supreme Court stated: “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”<sup>1</sup> The Court has long demanded that lower courts “be alert to factors that may undermine the fairness of the factfinding process” and “carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.”<sup>2</sup> Though acknowledging that “[t]he actual impact of a particular practice on the judgment of jurors cannot always be fully determined,” the United States Supreme Court has stressed “that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny.”<sup>3</sup>

Nevertheless, psychological factors surrounding the order of presentation at trial do impact the fact-finding process in ways not often examined. This article will discuss the basic, powerful psychological principles at play in seemingly minor aspects of the trial structure that dramatically affect the outcome for criminal defendants who may never truly receive due benefits of the presumption of innocence.

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Hyatt wants to thank his wonderful wife, Stephanie, and parents, Jeff and Lisa, for all of their love and support throughout law school and beyond. Hyatt also wants to thank his friends Tabetha Bryant and Oliver Khan for their tireless assistance in the process of writing this article. Hyatt also thanks Patrick Leneghan, Jr., J.D. for taking the time, effort, and money to give him a start in the field of law. Finally, Hyatt dedicates this article to his “Ninny” who has provided the foundation for his academic successes throughout his entire life.

<sup>1</sup> Coffin v. United States, 156 U.S. 432, 453 (1895).

<sup>2</sup> Estelle v. Williams, 425 U.S. 501, 503 (1976) (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

<sup>3</sup> *Id.* at 504 (citing *Estes v. Texas*, 381 U.S. 532 (1965); *In re Murchison*, 349 U.S. 133 (1955)).

The fundamental right to a presumption of innocence is one that the prosecution should have to overcome purely through the presentation of probative evidence of guilt beyond a reasonable doubt. But the presumption of innocence is significantly diluted when the prosecution is given a preferred status of influence on the jury. This preferred status results from powerful psychological principles known as the primacy effect, the priming effect, the framing effect, and the perseverance effect.

This article proposes to give defendants control of the trial structure through five independent options: to conduct the first voir dire, to deliver the first opening statement, to present evidence prior to the prosecution's case, to cross-examine a prosecution witness before direct examination, and to present the first closing argument. Each choice would be independent of the others, and would afford the presumption of innocence a better chance of surviving until the jury deliberates.

## II. PSYCHOLOGICAL PRINCIPLES IMPACTING EVIDENCE PROCESSING

Human judgments can be influenced or even determined by subtle psychological influences.<sup>4</sup> The primacy,<sup>5</sup> priming,<sup>6</sup> and framing<sup>7</sup> effects are among these influences.<sup>8</sup> Overarching these influences is the concept of the perseverance effect, which gives these already powerful persuasion tools a particularly pungent punch.<sup>9</sup> These basic principles will be briefly described below.

### A. Primacy Effect

The primacy effect emphasizes the presentation relationship between those facts and observations "with the strength of the earlier items in the list exaggerated over those presented later."<sup>10</sup> The ultimate judgment is manipulated "as a function

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<sup>4</sup> Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1380–81 (2009) (citing RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008); Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3 (2006); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211 (2003); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003)).

<sup>5</sup> GORDON B. MOSKOWITZ, *SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS* 45 (2005).

<sup>6</sup> ELLIOT ARONSON ET AL., *SOCIAL PSYCHOLOGY* 56–57 (7th ed. 2010).

<sup>7</sup> MOSKOWITZ, *supra* note 5, at 33–34.

<sup>8</sup> See, e.g., *id.* at 408.

<sup>9</sup> ELLIOT ARONSON ET AL., *SOCIAL PSYCHOLOGY* 66–67 (6th ed. 2007). This is also called the Confirmation Bias, but in the context of combining psychological principals, this effect is better described as causing a presumption to persevere over future information.

<sup>10</sup> MOSKOWITZ, *supra* note 5, at 45.

of the information that comes earlier.”<sup>11</sup> Information that comes later is therefore not given proper weight, effort, or evaluation when it is factored into the final judgment.<sup>12</sup> For example, if you are told a phone number, list of names, or series of events, the first numbers, names, and events will be the most likely to be remembered. Thus, even without changing substance or presentation form, ordering factors may have a significant impact upon judgments people make and can impact whether key factors are recalled or overlooked.

### B. Priming Effect

“Priming,” a considerable factor impacting fact-finders and fact-finding, is the process by which recent experiences increase the likelihood that a related presumption<sup>13</sup> will be a factor in decision-making.<sup>14</sup> The presumption created by priming largely affects the decisions one makes about ambiguous facts.<sup>15</sup> For example, if one passes someone on the street who is mumbling, walking funny, and making random noises and strange faces, most would consider this behavior odd. Seeing someone act odd like this after reading about alcohol abuse will likely result in the presumption that the odd behavior is the result of drunkenness.<sup>16</sup> By contrast, seeing the same event, but this time after reading about mental illness, will likely result in the presumption that mental illness is the cause of the odd behavior.<sup>17</sup> Simple priming can dramatically affect the presumed causation of behavior.

Experiments that demonstrate priming follow a typical pattern: a priming task has subjects incidentally exposed to information that will later be related to a judgment, which is then followed by the related judgment tasks.<sup>18</sup> Consider the following simple experiment. Say “silk” quickly five times. Now answer the question: “what do cows drink?” The answer is below, as to not spoil it for fast readers.<sup>19</sup> This example demonstrates that the order is key to the effect. Repeating words is a very effective method of priming, but is not required for a priming

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 213.

<sup>13</sup> Psychologists frequently use the more technical phrasing “accessible information” within a schema, rather than using the word presumption. I have chosen to use the word presumption, as it flows better with the legal doctrine I will discuss later.

<sup>14</sup> ARONSON ET AL., *supra* note 6, at 56–57.

<sup>15</sup> *Id.*; Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 345 (1994).

<sup>16</sup> ARONSON ET AL., *supra* note 6, at 56–57.

<sup>17</sup> *Id.*

<sup>18</sup> MOSKOWITZ, *supra* note 5, at 408.

<sup>19</sup> If you said “milk,” you are wrong. Cows drink water; they produce milk. Most people will say milk because the “ilk” sound is primed, and milk is a word often associated with cows.

effect; repetition of ideas (such as guilt) is equally effective.<sup>20</sup> However, priming is a quick, unconscious, and unintentional phenomenon based on whatever the subject happened to be thinking of earlier.<sup>21</sup> Thus, while words are frequently used to establish the “prior thought” aspect of the concept, they do not have to.

Priming typically requires four conditions: applicability, ambiguity, assertibility, and awareness.<sup>22</sup> The first, applicability, means that whatever presumption has been primed must be relevant to the judgment to be made.<sup>23</sup> If a decision is completely unrelated to the priming task, the judgment will be unaffected by it.<sup>24</sup> Continuing the “silk cow” example, it would be far less effective to say silk quickly five times, and then ask what color the sky is. Further, as the priming increases on a given presumption, the more readily a person’s mind will default to that presumption, and the brain will broaden its criteria for applicable judgments.<sup>25</sup> Thus, a strong prime will result in even judgments only remotely relevant being affected by the primed presumption.<sup>26</sup> The opposite is true as well; a strong relationship to the prime will allow a weak prime to have an effect on the judgment.<sup>27</sup> This is because the primed perceiver is ready to see what he has been primed to see, applicability is expanded, and factors otherwise overlooked, but linked to the specific constructs that were primed, are used to bolster the judgment that the priming produces.<sup>28</sup>

Second, priming requires applicability to an ambiguity in the situation in order for a judgment to be made.<sup>29</sup> Without ambiguity, one is left simply observing, and not judging the situation; thus, the primed presumption would have little effect.<sup>30</sup> For example, if you say silk quickly five times, and are asked, “what is in your hand,” you will simply look in your hand and observe the answer. Or, if someone is acting oddly, but is being escorted from a mental hospital in a strait jacket, then mental illness will be the conclusion, not drunkenness. The ambiguity element is thus essential for an effective prime to have an impact.

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<sup>20</sup> Martin J. Pickering & Victor S. Ferreira, *Structural Priming: A Critical Review*, 134 PSYCHOL. BULL. 427, 437 (2008) (citing Martin J. Pickering & Holly P. Branigan, *The Representation of Verbs: Evidence from Syntactic Priming in Language Production*, 39 J. MEMORY & LANGUAGE 633 (1998)).

<sup>21</sup> ARONSON ET AL., *supra* note 6, at 58.

<sup>22</sup> MOSKOWITZ, *supra* note 5, at 409.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 409–10.

<sup>25</sup> *Id.* at 410.

<sup>26</sup> *Id.* at 410–11.

<sup>27</sup> *Id.* at 412.

<sup>28</sup> *Id.* at 411–12.

<sup>29</sup> *Id.* at 412.

<sup>30</sup> *Id.*

The third condition for priming is assertibility. If a situation goes beyond ambiguity to unintelligible, the primed presumption will have no effect.<sup>31</sup> Simply put, a primed presumption will fill in small gaps of information actually requiring informational gaps, but will not fill large, incongruous gaps of information. Also, the presumption must be free to fit into the small gaps; thus social constraints may inhibit a primed presumption from being used.<sup>32</sup> Additionally, once a socially inhibited presumption becomes free to be expressed,<sup>33</sup> or a person feels free to express a judgment regardless of the acceptability of the presumption,<sup>34</sup> that presumption will be empowered.<sup>35</sup>

Finally, before priming can create a meaningful presumption, the subject of the priming must not have awareness of the priming.<sup>36</sup> As alluded to above, the mind must consider the primed presumption as its own, and not the result of an outside influence; particularly, if the influence is not one the subject is open to, the person will take steps to remove the impact of the priming on their judgment.<sup>37</sup> Thus, the safest form of priming is hidden,<sup>38</sup> whether by distraction<sup>39</sup> or subliminally (i.e., indirectly).<sup>40</sup> Effective priming must be done with little or no notice by the subject, whether directly or indirectly, to avoid conscious overpowering.<sup>41</sup>

With all four factors present in the proper conditions, priming can have a profound effect on judgments in many situations. Thus, the person priming may have significant power to shape the conclusions another person reaches in ambiguous situations.

### C. Framing Effect

Framing is a process whereby communicators, consciously or unconsciously, act to construct a point of view that encourages the facts of a given situation to be interpreted by others in a particular manner.<sup>42</sup> Frames operate in four key ways: they define problems, diagnose causes, make moral judgments, and suggest

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<sup>31</sup> *Id.* at 412–13.

<sup>32</sup> *Id.* at 413.

<sup>33</sup> For example, racism is easier to express at a Klan rally than an NAACP meeting.

<sup>34</sup> For example, a company's owner will usually speak more freely than the employees on any subject.

<sup>35</sup> See MOSKOWITZ, *supra* note 5, at 413.

<sup>36</sup> *Id.* at 415.

<sup>37</sup> *Id.*

<sup>38</sup> See *id.* at 415–16.

<sup>39</sup> Such as where the tasks were presented as separate, but were together. *Id.* at 410–11.

<sup>40</sup> Such as where tasks covertly incorporated priming stimuli. *Id.* at 415–16.

<sup>41</sup> *Id.* at 416–17.

<sup>42</sup> Jim A. Kuypers, *Framing Analysis*, in *RHETORICAL CRITICISM: PERSPECTIVES IN ACTION* 181, 182 (Jim A. Kuypers ed., 2009).

remedies.<sup>43</sup> Frames are often found within a narrative account of an issue or event, and are generally the central organizing idea.<sup>44</sup>

The framing effect may be the most complex and fluid of the psychological principles that cause errors in judgment.<sup>45</sup> While priming will create presumptions that affect judgment passed on ambiguous observations, the framing effect can actually alter the perceived meaning of concrete data.<sup>46</sup> Altering identical scenarios exclusively through different frames can have dramatically different effects on judgment.<sup>47</sup> Framing can be done “fortuitously, without anyone being aware of the impact of the frame on the ultimate decision.”<sup>48</sup> Framing can also be used both inadvertently (which is most common) and “deliberately to manipulate the relative attractiveness of options.”<sup>49</sup>

Regardless of the chosen form or skill of hiding it, proper framing will also determine whether the judgment ascribes positive or negative features to a person or event.<sup>50</sup> By simply altering how presented facts are framed, even serious judgments can be manipulated, such as which parent should have custody of a minor child.<sup>51</sup> If the judgment is based on awarding custody, for example, the fact-finder will focus on positive characteristics of the person seeking custody.<sup>52</sup> Conversely, if the question is whether to revoke custody, the fact-finder will focus on the negative characteristics.<sup>53</sup> Although the presented characteristics are the same, the outcome of life-altering decisions can be completely reversed through the framing of concrete facts.<sup>54</sup> (This effect has also been seen to occur in medical decision-making: when given the option for radiation therapy, subjects are 26% more likely to say yes to the treatment if the mortality rate is 0% the first year, and

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* As an example of such a narrative account, see JIM A. KUYPERS, *BUSH’S WAR: MEDIA BIAS AND JUSTIFICATIONS FOR WAR IN A TERRORIST AGE* 8 (2009).

<sup>45</sup> Cf. Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 395–97 (2006) (observing “the framing effect” to be one “cognitive distortion” that people use “to make decisions about probabilities,” an idea posited in light of the fact that “decisionmaking often involves an abundance of information, time pressures, and an array of possible alternatives”).

<sup>46</sup> MOSKOWITZ, *supra* note 5, at 31–33.

<sup>47</sup> See *id.* at 32–33.

<sup>48</sup> Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, in *CHOICES, VALUES, AND FRAMES* 1, 10 (Daniel Kahneman & Amos Tversky eds., 2000).

<sup>49</sup> *Id.*

<sup>50</sup> MOSKOWITZ, *supra* note 5, at 33–34; see also *id.* at 34 (citing Yoav Ganzach & Yaacov Schul, *The Influence of Quantity of Information and Goal Framing on Decision*, 89 ACTA PSYCHOLOGICA 23 (1995)).

<sup>51</sup> *Id.* at 34.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

10% the second, as opposed to a 100% survival rate the first year, but 90% survival rate the second.<sup>55</sup>)

In addition to judgment on important concrete details being affected, irrelevant details can profoundly influence judgments as a result of effective framing.<sup>56</sup> “Often people’s preferences are unclear and ill-formed, and their choices will inevitably be influenced by default rules, framing effects, and starting points.”<sup>57</sup> Effective framing can not only elevate the impact of objectively irrelevant data, it can also reverse the impact of that data.<sup>58</sup> Because framing affects what people do and do not perceive, it intrinsically prevents overcoming the created presumption simply by thinking harder; therefore it will drastically alter what people think and do even in dire circumstances that demand careful judgments.<sup>59</sup>

Finally, “[t]he framing of options affects judgments not only on factual questions but on moral ones as well.”<sup>60</sup> Once an issue is framed in one context, the context that follows will also be subject to the initial framing.<sup>61</sup> It is evident that the power of the primacy effect would also come into play, and this is not the only time these principles build off of each other. Therefore, a speech, evidence, or characterizations presented early in the decision-making process will hinder the acceptability of later speeches, evidence, or characterizations both directly and indirectly related to the initial frame.

#### D. Perseverance Effect

An umbrella principle to the presumption-creating principles of primacy, priming, and framing, is called the “perseverance effect.”<sup>62</sup> People have a tendency to hold onto beliefs that they have already established, even when faced with evidence to the contrary.<sup>63</sup> People cling to the early pieces of information that have quickly formed<sup>64</sup> into a presumed judgment to avoid ambiguity, uncertainty,

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<sup>55</sup> James N. Druckman, *Using Credible Advice to Overcome Framing Effects*, 17 J.L. ECON. & ORG. 62, 74–75 (2001).

<sup>56</sup> MOSKOWITZ, *supra* note 5, at 34.

<sup>57</sup> Sunstein & Thaler, *supra* note 4, at 159 (emphasis omitted).

<sup>58</sup> See MOSKOWITZ, *supra* note 5, at 34–35.

<sup>59</sup> *Id.* at 35.

<sup>60</sup> Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 1045 (2005).

<sup>61</sup> Scott Medlock, *NRA = No Rational Argument? How the National Rifle Association Exploits Public Irrationality*, 11 TEX. J. C.L. & C.R. 39, 45 (2005) (“[T]he initial frame through which an issue is understood shapes interpretation of additional facts and observations.”).

<sup>62</sup> See ARONSON ET AL., *supra* note 9, at 66.

<sup>63</sup> MOSKOWITZ, *supra* note 5, at 213.

<sup>64</sup> The perseverance effect is a very fast process where the effect of the initial impression can last as a byproduct of the brain’s tendency to fill in the gaps in what it perceives. It also creates unwillingness on the part of a believer to admit that their cognition was erroneous. See generally Lee

and inaccuracy.<sup>65</sup> Beyond simple evidence to the contrary, if the facts used to create the primed, framed, or primacy-created presumption are discredited, the judgment will persevere.<sup>66</sup> Even in a courtroom, if a jury hears information that is later demonstrated to be untrue, the belief can persist.<sup>67</sup> The presumption initially created can be so powerful that it survives even complete discrediting.<sup>68</sup>

These forces have been demonstrated through various "debriefing paradigm" experiments. Subjects begin by analyzing fictitious evidence in support of a hypothesis.<sup>69</sup> Then researchers measure their attitude toward the validity of the hypothesis.<sup>70</sup> The subjects then learn that the evidence was fictitious, and researchers then re-measure the subjects' attitudes about the hypothesis.<sup>71</sup> Within the range of change, at least some of the initial beliefs have been shown to remain in all of the subjects.<sup>72</sup> The strength of these presumptions will sometimes survive overwhelming evidence to the contrary; even if the subjects are convinced that the evidence was false, belief in the initial conclusion remains.<sup>73</sup>

### III. APPLICATION OF PSYCHOLOGICAL INSIGHTS TO THE STRUCTURE OF TRIAL

The American trial system lends itself to each one of the psychological pitfalls discussed above at nearly every stage of the proceeding. Currently, courts make some attempt to reduce psychological influences on the jury by, for example, removing shackles from defendants prior to the jury entering. But these measures fall short of true protection of the defendant's presumption of innocence and right to be convicted only based on the evidence presented. While such steps contribute to a fair trial, they do nothing to address the psychological imbalance in favor of the prosecution as a result of its presentation position; thus, reform needs to occur

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Ross, Mark R. Lepper & Michael Hubbard, *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880 (1975); Judith Tutin, *Belief Perseverance: A Replication and Extension of Social Judgment Findings*, Paper Presented at the 91st Annual Convention of the American Psychological Association (Aug. 26-30, 1983), *microformed on* Educational Resources Information Center ED240409 (U.S. Dep't of Educ.).

<sup>65</sup> MOSKOWITZ, *supra* note 5, at 365.

<sup>66</sup> ARONSON ET AL., *supra* note 9, at 66.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 129, 147-49 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 99-100 (1999).

<sup>73</sup> Craig A. Anderson, Mark R. Lepper & Lee Ross, *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037, 1042 (1980).



that takes that power and gives it to the defendant. In order to do this effectively, while continuing to hold the prosecution to its burden of proof, defense attorneys should have an option to order trial presentation.

#### A. Current Problems Facing the Presumption of Innocence

Courts have long recognized that factors other than evidence can impact and even skew a jury verdict. Currently courts have procedures to reduce psychological influences on the jury. However, they fall short of their ultimate goal: protecting defendants' presumption of innocence.

##### 1. Current Efforts and Doctrines Seeking to Avoid Undue Prejudice

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment,"<sup>74</sup> and "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."<sup>75</sup> As the United States Supreme Court points out in its important ruling in *Estelle v. Williams*, the judiciary has long fought to eliminate practices that heighten the risks of unfair prejudice degrading the presumption of innocence almost without exception.<sup>76</sup> The Federal Judicial Center in its criminal pattern jury instructions, for example, suggests that the presumption of innocence be discussed with the jury immediately at the start of any instructions.<sup>77</sup>

Furthermore, the United States Supreme Court has stressed that "[d]ue process requires that the accused receive a [fair] trial by an impartial jury,"<sup>78</sup> and lower courts have held true to the principle that "[n]o insinuations, indications or implications suggesting guilt should be displayed before the jury."<sup>79</sup> The United States Supreme Court has declared that when courtroom practices create "an 'unacceptable risk . . . of impermissible factors coming into play,' there is 'inherent prejudice' to a defendant's constitutional right to a fair trial and reversal is required."<sup>80</sup> Even in situations where some form of prejudicial treatment in front of the jury is permissible or even required, courts work to minimize the impact on

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<sup>74</sup> *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing *Drope v. Missouri*, 420 U.S. 162, 172 (1975)).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 504.

<sup>77</sup> See FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 1-6 (1987) [hereinafter PATTERN INSTRUCTIONS] (reciting jury instruction 1 and providing commentary regarding the instruction). Even here we see recognition of the power of presentation order.

<sup>78</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

<sup>79</sup> *Boswell v. Alabama*, 537 F.2d 100, 102 (5th Cir. 1976) (quoting *Brooks v. Texas*, 381 F.2d 619, 624 (5th Cir. 1967)).

<sup>80</sup> *Musladin v. Lamarque*, 427 F.3d 653, 656 (9th Cir. 2005), *vacated*, *Carey v. Musladin*, 549 U.S. 70 (2006) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)).

the jury.<sup>81</sup> Although prejudicial factors cannot always be avoided,<sup>82</sup> current doctrines require an “essential state policy” before permitting the unavoidable factor to continue.<sup>83</sup>

For example, numerous courts have held, and the United States Supreme Court affirmed, that “an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system.”<sup>84</sup> The United States Supreme Court reasoned that, at a capital trial, “[t]he defendant’s clothing is . . . likely to be a continuing influence throughout the trial.”<sup>85</sup> Prior to that, the United States Supreme Court held that when “placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play.”<sup>86</sup> The Court has also held that “the Constitution forbids the use of visible shackles” at the guilt phase and even the penalty phase of a capital trial.<sup>87</sup> Lower courts have further prohibited spectators from wearing anti-rape buttons as they sat in the gallery.<sup>88</sup>

As essential as these various methods are, current efforts fall short of protecting the presumption of innocence. The psychological ramifications of the prosecution presenting first at every stage of a trial, and most sub-parts of those stages, has resulted in an unnecessary and a potentially highly prejudicial psychological effect on jury decision-making. It is now time for the courts to eliminate this very powerful, prejudicial, and avoidable aspect of trial practice that should have no place in a jury’s verdict.

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<sup>81</sup> See *Lopez v. Thurmer*, 573 F.3d 484, 490–93 (7th Cir. 2009).

<sup>82</sup> See *Illinois v. Allen*, 397 U.S. 337, 342–44 (1970).

<sup>83</sup> *Estelle v. Williams*, 425 U.S. 501, 505 (1976).

<sup>84</sup> *Id.* at 504 (citing *Gaito v. Brierley*, 485 F.2d 86 (3d Cir. 1973); *Hernandez v. Beto*, 443 F.2d 634 (5th Cir. 1971); *Brooks v. Texas*, 381 F.2d 619 (5th Cir. 1967); *Miller v. State*, 457 S.W.2d 848 (Ark. 1970); *People v. Zapata*, 34 Cal. Rptr. 171 (Cal. Ct. App. 1963); *Eaddy v. People*, 174 P.2d 717 (Colo. 1946); *People v. Shaw*, 164 N.W.2d 7 (Mich. 1969); *Commonwealth v. Keeler*, 264 A.2d 407 (Pa. Super. Ct. 1970); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY § 4.1 (b) (Approved Draft 1968)).

<sup>85</sup> *Id.* at 505.

<sup>86</sup> *Id.* (citing *Turner v. Louisiana*, 379 U.S. 466, 473 (1965)).

<sup>87</sup> *Deck v. Missouri*, 544 U.S. 622, 624 (2005); see also *Earhart v. Konteh*, No. C-1-06-62, 2007 U.S. Dist. LEXIS 63816, at \*22–25 (S.D. Ohio Aug. 29, 2007) (citing several cases for the same proposition).

<sup>88</sup> See, e.g., *Norris v. Risley*, 918 F.2d 828, 831 (9th Cir. 1990).

## 2. Psychological Basis for the Presumption of Guilt

Although courts have sometimes acknowledged psychological factors such as priming,<sup>89</sup> they are not recognized as a matter of course. When making decisions about trial structure, courts have a responsibility to address the psychological principles affecting fact-finders because even the simple fact of being a juror can alter judgments.<sup>90</sup> Primacy, priming, and framing are quick, unconscious, and unintentional,<sup>91</sup> but have a powerful and lasting effect.<sup>92</sup> Yet courts fail to consider such effects by continuing to give prosecutors the benefits of these potent forces and, in turn, withholding them from the defendant.

As previously discussed, the primacy effect is the result of judgments being made “with the strength of the earlier items in the list exaggerated over those presented later.”<sup>93</sup> Consequently, the traditional order in criminal jury trials inherently benefits the prosecution. By going first, the prosecution’s arguments, evidence, and rhetoric will be placed before, and in turn get exaggerated over, the defendant’s. In addition to the inherent primacy effect benefiting the prosecution, the status quo gives the prosecution the first chance at priming members of the jury and framing the argument. Thus, the exaggeration that results from primacy will include the priming and the framing effects already benefiting the prosecution’s presentation.<sup>94</sup> Finally, the perseverance effect may give the prosecution the only chance to prime the jury and frame the arguments. This forces the defendant to overcome an even steeper presumption in favor of the prosecution. Regardless of the evidence, this psychological battle in a criminal trial should be uphill for the government, not for the defendant, with regard to the jury’s presumptions.

The perseverance effect leads people to cling to early and quickly created presumptions when forming a judgment in order to avoid ambiguity, uncertainty, and inaccuracy.<sup>95</sup> The need to avoid ambiguity, uncertainty, and inaccuracy is particularly high in a criminal trial, where jurors are intrinsically aware and repeatedly reminded that they are tasked with resolving ambiguities and asked to decide, with certainty, issues with high stakes that call for assurances of accuracy. Thus, simply by virtue of the role they are given, jurors are more susceptible to the perseverance effect than other subjects would be otherwise. This vulnerability to

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<sup>89</sup> See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1503 (M.D. Fla. 1991).

<sup>90</sup> See generally Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How “Legal Priming” Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059 (2005).

<sup>91</sup> See ARONSON ET AL., *supra* note 6, at 58.

<sup>92</sup> See MOSKOWITZ, *supra* note 5, at 213.

<sup>93</sup> *Id.* at 45.

<sup>94</sup> See *infra* pp. 592-96.

<sup>95</sup> MOSKOWITZ, *supra* note 5, at 365.

influence makes whatever presumptions are formed early in a trial particularly damaging to the opponent, who is permitted to address them only later.

The potential damage posed by these forces can be severe: with juries psychologically inclined to ignore subsequent evidence that could directly contradict the prosecution's evidence, defendants can face the primed, framed, or primacy-created presumption of guilt that cannot be readily overcome simply with argumentation and evidence of impeachment. Any ultimately weak evidence later presented by the defense—even if no weaker than the evidence presented by the prosecution—will be discounted, as the prosecution benefits from psychological presumptions.<sup>96</sup> Thus, many defendants will be particularly vulnerable to the perseverance effect affecting the verdict in their cases. Even in a courtroom where the jury has been told to keep an open mind, if the jury initially hears information that only later is demonstrated to be untrue, a false belief can unreasonably persist.<sup>97</sup>

As discussed before, people have a tendency to hold onto beliefs that they have already established, even when faced with direct evidence to the contrary.<sup>98</sup> In a criminal trial context, beliefs are likely to be formed earlier rather than later. Globally, this means either during the prosecution's opening or during its case-in-chief; on a more micro level, this means during the prosecution's direct examination. These formed beliefs will then be held onto even when faced with the defendant's arguments or evidence presented to the contrary. Though jurors are instructed not to form beliefs early in the trial, natural psychological forces will still prompt belief formation.

The priming effect is present and favors the prosecution in every trial. Though this effect may not always actually affect trial outcomes, the four conditions of priming—applicability, ambiguity, assertibility, and awareness<sup>99</sup>—are all nonetheless always present. In fact, each condition may be necessary for a trial to occur. Lawyers and jurors are forced to have each condition present, either by law, jury instruction, or circumstance.

First, every trial-related act an attorney does, including those with a priming effect, must be applicable to the case. "To be admissible, evidence must be relevant."<sup>100</sup> Indeed, to be useful, evidence must be relevant; everything an attorney does should have applicability to the disputed issue at hand. Additionally, even ancillary evidence will bolster the case of the earlier primer. For example, even if the judge allows only minimally relevant information to be admitted at a trial, or an attorney gives only a minimally relevant oratory, priming will result in a default to the created presumption and broaden the jurors' criteria for applicable

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<sup>96</sup> See ARONSON ET AL., *supra* note 9, at 66.

<sup>97</sup> *Id.*

<sup>98</sup> MOSKOWITZ, *supra* note 5, at 213.

<sup>99</sup> *Id.* at 409.

<sup>100</sup> *United States v. Lawson*, 494 F.3d 1046, 1052 (D.C. Cir. 2007) (citing FED. R. EVID. 402, 403).

judgments.<sup>101</sup> Finally, even if an attorney does not consciously utilize the power of priming, or is ineffective in doing so, a strong relationship to the prime will allow even a weak prime to have an effect on judgment.<sup>102</sup> This principle is more likely to be involved than the former principle because even the worst attorney should be able to recognize whether evidence and arguments have a strong relationship to their case. Thus, even if the priming opportunity is wasted, by simply using evidence that has a good relationship to the case, the prosecution will have an advantage based on priming.

Second, ambiguity is also obvious in the trial context. No one doubts that trials involve ambiguous facts—a trial without ambiguity is simply a waste of time.<sup>103</sup> In fact, not all of the actions courts take described in the previous section are present in every case. Further, juries are the “finder[s] of fact and weigher[s] of credibility,”<sup>104</sup> tasks both inherently involving ambiguity. Likewise, if the judge takes on this role, she too will have a task with inherent ambiguity. While the law may not produce ambiguity in all trials, circumstances can certainly lead to such a result.

Third, the primed presumption must be free to be asserted.<sup>105</sup> During deliberations, jurors are free to make decisions, inferences, and presumptions, and to make them free from second-guessing.<sup>106</sup> Judges, as fact-finders, are also free to make decisions, inferences, and presumptions about the facts (although maybe more subject to second-guessing from attorneys). In addition to the explicit legal right to views on evidence, regardless of who the fact-finder is, the very role of fact-finder means that views are freely asserted.

In addition to this third condition for effective priming being present in trials, the law compounds the effect of priming. When the once inhibited presumption—created and reinforced during trial—becomes free to be expressed during deliberations, that presumption will be empowered.<sup>107</sup> This inhibition leading to empowerment is particularly present in the jury trial context.<sup>108</sup> Jurors are

<sup>101</sup> See MOSKOWITZ, *supra* note 5, at 409–10.

<sup>102</sup> See *id.* at 412.

<sup>103</sup> Admittedly, some trials are clear-cut, but the fact that some criminal trials cannot be psychologically influenced is not a reason to ignore the concerns created within the majority of trials.

<sup>104</sup> *United States v. Abel*, 469 U.S. 45, 52 (1984).

<sup>105</sup> MOSKOWITZ *supra* note 5, at 413.

<sup>106</sup> See, e.g., PATTERN INSTRUCTIONS *supra* note 77, at 3 (“Your deliberations will be secret. You will never have to explain your verdict to anyone.”).

<sup>107</sup> See MOSKOWITZ *supra* note 5, at 413.

<sup>108</sup> See, e.g., PATTERN INSTRUCTIONS *supra* note 77, at 3–4:

During the course of the trial, you should not talk with any witness, or with the defendant, or with any of the lawyers in the case. Please don’t talk with them about any subject at all. In addition, during the course of the trial you should not talk about the trial with anyone else—not your family, not your friends, not the people you work with. Also, you should not discuss this case among yourselves until I have instructed you on the law and you have gone to the jury room to make your decision at the end of the trial.

instructed at the beginning of most trials not only to not discuss their forming opinions, but to not form definitive opinions at all until the close of evidence,<sup>109</sup> a nearly impossible feat. By bottling up the forming presumptions and encouraging jurors to ignore the presumptions being formed by the evidence and the arguments of the prosecution, the priming is all the more pervasive.

Fourth, and finally, the subject of the priming must not have awareness of the priming,<sup>110</sup> meaning the most powerful form of priming is hidden,<sup>111</sup> whether by distraction<sup>112</sup> or subliminally (indirectly).<sup>113</sup> While jurors know they are there to be persuaded, the fact of priming<sup>114</sup> is not likely to be immediately noticed by the average juror. Jurors usually are not trained to, and therefore do not, recognize the subconscious presumptions that are being created by the presentation order; thus they cannot or do not make the necessary effort to counteract the effects. In addition, distractions abound: new place, new tasks, new people, and so on. With jurors being bombarded with information, it is not a stretch to conclude that most do not notice that the forming opinions they should not be thinking about are present.

The framing effect may be the most powerful psychological tool in the courtroom. While prosecutors enter a setting prepared for priming, and enhanced by the primacy position, they also receive an additional opportunity: the framing effect. “[A]droitly framing the question is an important part of argumentation, often taught to students in advocacy courses as a technique for increasing their ability to be persuasive in pursuit of the pre-determined goal of victory for their client . . . .”<sup>115</sup> What most attorneys do not realize is that this “important part of argumentation” is primarily, if not exclusively, for the benefit of the first presenter. In criminal cases, that is the prosecution.

By simply altering how presented facts are framed, even serious judgments can be altered.<sup>116</sup> For example, government programs<sup>117</sup> are often named to induce

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<sup>109</sup> *United States v. Akpan*, 407 F.3d 360, 366 (5th Cir. 2005) (noting that the district court instructed the jury “not to form an opinion until they had heard all of the evidence”); *United States v. Yonn*, 702 F.2d 1341, 1344 (11th Cir. 1983) (observing that the trial court judge “admonish[ed] the jury not to engage in pre-deliberation discussions concerning the case and not to form an opinion until [the case] was submitted to them for decision”); *Chambers v. Kincheloe*, No. 94-35586, 1995 U.S. App. LEXIS 2729, at \*3 (9th Cir. Feb. 10, 1995) (“[T]he jury should not form an opinion until the close of the evidence.”).

<sup>110</sup> MOSKOWITZ, *supra* note 5, at 415.

<sup>111</sup> *See id.* at 415–16.

<sup>112</sup> Such as where the tasks were presented as separate, but were together. *Id.* at 410–11.

<sup>113</sup> Such as where tasks covertly incorporated priming stimuli. *Id.* at 415–16.

<sup>114</sup> As well as the other psychological tools at work.

<sup>115</sup> Francis J. Mootz III, *Nietzschean Critique and Philosophical Hermeneutics*, 24 CARDOZO L. REV. 967, 1029 (2003).

<sup>116</sup> MOSKOWITZ, *supra* note 5, at 34.

<sup>117</sup> For example, “foreign aid” implies that spending money will aid foreigners, rather than harm them. Ten percent unemployment sounds bad, but 90 percent employment sounds good.

a certain positive attitude toward them.<sup>118</sup> Prosecutors clearly get the first chance to present facts with the first opening, first case-in-chief, first interaction with its witnesses, and first closing. While primacy is not essential to effective framing, not only does primacy magnify the effectiveness of the frame, it also sets frames without competition. With the first chance at framing, each successful, yet uncontested, frame will likely exclude competition on the given fact or issue. Once an issue is framed in one context, such as the prosecution's opening or case-in-chief, the context that follows, the defense opening or case-in-chief, will also be subject to the initial framing.<sup>119</sup> The prosecution will not only benefit from the inherent resistance to challenge within framing, its framing will also be resistant to defense arguments through the perseverance effect.

The framing effect that prosecutors wield can actually alter the perceived meaning of concrete data later presented by the defense.<sup>120</sup> This can be the most prejudicial effect that presentation order has on defendants. As suggested in Part II, the defense can present evidence or data that exonerates the defendant or discredits a prosecution's witness or evidence, but an adroitly framed fact-finder will reduce or reverse the meaning of this data. Prosecutors further benefit by effectively framing a positive or negative judgment of the defendant or the event at issue.<sup>121</sup> Prosecutors can demonize defendants in the fact-finder's mind before the defendant's behavior can be judged objectively. This aspect of framing is generally unavailable to defendants, who usually do not have an opportunity to present an alternative "bad guy." Further, a defense of circumstances, such as self-defense, may be an uphill battle once the prosecution has set in place a persevering negative judgment of the defendant. Having an overall frame of criminal activity can distract or blind the fact-finder during the presentation of exculpatory evidence. Again, the primacy and perseverance of the prosecution's perspective will amplify the prejudice toward the defendant.

Effective framing not only can elevate the impact of objectively irrelevant data, it can also reverse the impact of that data.<sup>122</sup> So, if the prosecution strategically selects facts that are irrefutable and minimally relevant, and then emphasizes their importance, the defense may begin with an especially high, yet objectively inconsequential, hurdle. Further, evidence successfully framed by the prosecution, which objectively may help the defendant, can, if not already done

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"Social security" implies that the program can be relied on to provide security for a society. "Stabilization policy" implies that a policy will have a stabilizing effect.

<sup>118</sup> E.g., Sara Bleich, *Is It All in a Word? The Effect of Issue Framing on Public Support for U.S. Spending on HIV/AIDS in Developing Countries*, 12 HARV. INT'L J. PRESS/POL. 120, 121-22 (2007) (concluding that support changes when the phrase foreign aid is included or omitted from a survey question).

<sup>119</sup> Medlock, *supra* note 61, at 45.

<sup>120</sup> See MOSKOWITZ, *supra* note 5, at 31-33.

<sup>121</sup> See *supra* note 50.

<sup>122</sup> See MOSKOWITZ, *supra* note 5, at 34-35.

within the fact-finder's mind, be spun to harm the defendant's case.<sup>123</sup> This can be particularly damaging if the defense has stressed reliance on that evidence to the fact-finder. The fact-finder's ultimate conclusion is obvious: "if the defendant wants me to focus on this evidence that proves his guilt, he must be guilty."

Finally, unlike priming, framing is powerful enough to prevent a juror from overcoming the created presumption simply by thinking harder, even in dire circumstances that demand careful judgments.<sup>124</sup> Thus, even if a jury instruction could be given to prevent framing, no benefit could come of it. Framing effects result from people's tendency to accept information in the form in which it is provided, which in turn leads them to analyze the same situation differently depending on the given reference points or frames.<sup>125</sup> Further, this leaves defense counsel to determine which issues, evidence, and arguments were not effectively framed in order to know where attacks remain feasible—an unlikely, if not impossible, task given that everyone approaches and perceives situations differently. This characteristic, independent from the intensification of primacy and perseverance effects, may create insurmountable barriers to defendants achieving justice. Compounding this characteristic with primacy and perseverance effects demands a review of the current system.<sup>126</sup>

#### *B. Suggested Reform to the Criminal Justice System to Deal with Psychological Forces*

The trial structure should be flexible enough to give defendants the independent options to: deliver the first opening statement, present evidence prior to the prosecution's case, cross-examine a prosecution witness before direct examination, and/or present the first closing argument. Each aspect of this proposal has independent justification, need, and applicability. The power of the psychological tools discussed herein should rest in the hands of the defendant. So doing will provide the best chance at preserving a presumption of innocence, and confine the prosecution to evidence to achieve proof beyond a reasonable doubt, absent psychological manipulations. Moreover, given the diverse needs and opportunities among criminal cases, this right of first presentation should be an option for the defendant to avoid unintended consequences as a result of

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<sup>123</sup> For example, small failures in memory denote honesty, but can easily be framed as evidence of lying.

<sup>124</sup> MOSKOWITZ, *supra* note 5, at 35.

<sup>125</sup> B.A. Mellers et al., *Judgment and Decision Making*, 49 ANN. REV. PSYCHOL., 447, 455–56 (1998).

<sup>126</sup> See *Estelle v. Williams*, 425 U.S. 501, 504 (1976) (citing *Estes v. Texas*, 381 U.S. 532 (1965); *In re Murchison*, 349 U.S. 133 (1955)) ("The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny.").



unforeseen or unavoidable circumstances where the risk of psychological prejudice is outweighed, either by strategy or by necessity.

Finally, each stage—voir dire, opening statements, case-in-chief, direct and cross-examinations, and closing arguments—offers a new context subject to the above-discussed psychological tactics. The principles apply to the overall case as well as the individual parts. While every later context will be affected by preceding psychological effects, each stage will have its own points free to be influenced, and that influence should be at the discretion of the presumably innocent defendant. In this manner, we can finally begin to have a defendant with a chance to be presumed innocent, and a prosecution truly held to proof, based on the evidence, beyond a reasonable doubt.

### 1. Defendant's Control is Critical

First, the defendant should be given control of these powerful psychological tools, as we cannot continue to force the defendant to be tried under these psychological handicaps if we truly believe that:

Central to the right to a fair trial . . . is the principle that “one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.”<sup>127</sup>

We have seen the various ways that order aids various psychological tools affecting the outcome of a trial. The current format of a trial favors the prosecution, which wields these psychological weapons and can thereby unfairly shape jury interpretations of subsequent evidence.<sup>128</sup>

By leaving these psychological weapons in the hands of the prosecution, convictions, particularly in close cases, are more likely to be based on the order and method of presentation than on proof beyond a reasonable doubt. However, if the defendant is allowed to benefit from these tools, then the prosecution will be forced to overcome the presumptions created by primacy, perseverance effect, priming and framing with evidence alone. Given the strength of these psychological principles, whenever prosecutorial evidence of guilt overcomes the psychological effects now in the hands of the defendant, we can be much more confident that there is proof of guilt beyond a reasonable doubt.

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<sup>127</sup> *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)).

<sup>128</sup> See Joan K. Archer Rowland, Comment, *Communication and Psychology Variables: Reasons to Reject the Summary Jury Trial as an Alternate Dispute Resolution Technique*, 39 U. KAN. L. REV. 1071, 1095 (1991) (citing RICHARD D. RIEKE & RANDALL K. STUTMAN, COMMUNICATION IN LEGAL ADVOCACY 206 (1990)).

## 2. An Independent Option is Essential to an Effective Balance of the Burden of Proof and the Presumption of Innocence

Second, in order for the system to function properly, altering the order must be an option for the defendant at each stage. In some circumstances, it would obviously do more harm than good to force the defense to attempt to attack the prosecution's case before it is even presented. However, if the defense is prepared to offer a complete version of events, it needs to have the first opportunity to prime or frame the fact-finder's view of the evidence.

To avoid this prejudice, even in cases when the prosecution must go first, simply giving the defendant an opportunity to cross-examine the witness before the direct examination<sup>129</sup> will provide a chance for the defendant to prime or frame the testimony and evidence coming through that witness. Of course, every trial is different: strategy, circumstances, and skills will demand various permutations, but to be fair to the defendant, and to hold the prosecution to its constitutional burden, each stage must be open to the defendant benefiting from the persuasive power of psychological principles, leaving the prosecution to its evidence in meeting its burden of proof.

## 3. Ordering the First Opening Statement

Third, defendants will likely select the option to open first most often because an opening statement can win the trial. Members of juries have been reported to say that once the opening statements were made there was nothing left to the case.<sup>130</sup> Citing the "primacy" effect, the opening statement can have a profound effect, especially because information that is presented first has a stronger impact.<sup>131</sup> The primacy power of opening statements is so strong that jurors have been proven to overlook the lack of any evidence later at trial to support opening statements' claims.<sup>132</sup> By framing arguments in a certain way, fact-finder's process the information in such a way that they later recalled hearing the testimony promised, even though they had not.<sup>133</sup> Opening is so powerful that "research on the impact of the opening statement consistently reveals that as many as 80 to 90

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<sup>129</sup> See *infra* pp. 599-600 for explanation and logistics.

<sup>130</sup> Valerie P. Hans & Krista Sweigart, *Jurors' Views of Civil Lawyers: Implications for Courtroom Communication*, 68 IND. L.J. 1297, 1302 (1993) (citing ALFRED S. JULIEN, OPENING STATEMENTS § 1.01, at 2 (Supp. 1992)).

<sup>131</sup> Daniel G. Linz & Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOL. REV. 1, 8-10 (1984) (discussing an experiment which demonstrated "the impact of first impressions on later judgments").

<sup>132</sup> Tom Pyszczynski et al., *Opening Statements in a Jury Trial: The Effect of Promising More Than the Evidence Can Show*, 11 J. APPLIED SOC. PSYCHOL. 434, 442 (1981) ("The promise of persuasive testimony proving the defendant's innocence made jurors more sympathetic to the defendant's case, even though such testimony was never entered as evidence.").

<sup>133</sup> *Id.* at 442-43.

percent of all jurors have reached their ultimate verdict during or immediately after opening statements.”<sup>134</sup>

#### 4. Ordering the Presentation of Evidence

Fourth, presentation of evidence is likely to be the least sought change in criminal trials. Most criminal trials are based on attacking the insufficiency of the prosecution’s case. Occasionally a defendant will have an alternative story, and at such time, should have the right to present that story to a jury without the presence of prosecution’s psychological hurdles. This right will be particularly beneficial with affirmative defense cases as well. To have a jury sit through sometimes days of evidence supporting the prosecution will certainly overwhelm any benefit the defense received from the opening statement. Nevertheless, the strength of the prosecution presenting with primacy may be diluted with a defense option to cross prior to direct.

#### 5. Timing the Cross-Examination

Fifth, and possibly the most beneficial across all cases, is the defense option to cross-examine a prosecution’s witness prior to direct examination. This right is also the most necessary. Allowing a defendant to discredit evidence prior to presentation will enable the weight of an impeachment to have its true effect. This is particularly true because of the power the discussed psychological factors have with regard to simply discrediting evidence, and the vast amounts of criminal cases that rely on that tactic. By simply hearing testimony, which is implicitly asserted to be true, jurors will be primarily primed to believe the witness; further, the story that she presents will frame the perspective the jurors have on not only future evidence, but also future attacks on the evidence the witness herself presents.

The Federal Rules of Evidence essentially already allow the first examination to be cross-like. First, Rule 611 allows a party to call a “hostile witness, an adverse party, or a witness identified with an adverse party,” and then use leading questions during the examination.<sup>135</sup> Although this examination is still called a direct because the party calling the witness questions first, it demonstrates that the system can easily function with the first examination being conducted as a cross. Second, Rule 806 allows the first examination to be conducted “as if under cross-examination.”<sup>136</sup> Again, while the calling party still gets the first inquiry, this demonstrates that the practical effect of defense initially crossing witnesses called

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<sup>134</sup> DONALD E. VINSON, *JURY TRIALS: THE PSYCHOLOGY OF WINNING STRATEGY* 171 (1986).

<sup>135</sup> FED. R. EVID. 611(c) (“When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.”).

<sup>136</sup> FED. R. EVID. 806 (“If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.”).

by the prosecution will be minimal. Thus, since the Federal Rules of Evidence already supports an opening-cross, the only rule modification needed in federal court would be to give the defense the right to insert an opening-cross. Therefore, with the cross being presented first, the psychological implications will stop prejudicing the defense, and actually put the burden of proof on the *evidence* the prosecution can produce to support its case.

The strength of getting to the witness first is already recognized by most trial attorneys. When putting a witness on the stand with a bad past or a plea-deal, prosecutors will “draw the sting” by addressing it before the defense does.<sup>137</sup> The prosecutor is intentionally taking the opportunity to prime the jury to see the witness’ criminal history in a favorable light. The framing of the witness, by the State, as a good witness notwithstanding his or her past, will then carry over to defense’s cross-examination. This carry-over effect will minimize the defense’s arguments as to why the witness should not be believed. Both sides know that drawing the sting does not make the witness more credible, but the practice is evidence that it has some effect.

Criminal history is just one example of why giving the defense the opportunity to cross before direct is so important. There are many aspects of a witness’ testimony that will have to wait until the first re-cross, but there is a lot that the defense counsel can address before direct. Defense can challenge based on physical perspective if the witness is claiming to have seen the event. Defense can also emphasize the information that the prosecution would want to draw the sting, such as the plea deal the witness gets in exchange for testifying against the defendant. Defense would now be able to give the jury a fresh look at the type of person the prosecution has at the foundation of its case.

This change would enable the defense to re-present its story to the jury through questions before the prosecution is given the chance to present its story through the witness. This lead in reminding the jury of the story will create a presumption in favor of the defendant’s burden, or at least remove the assistance from the prosecution. This will then leave the witness to the evidence and believability when presenting her story. Thus, whatever inferences are not based on direct proof will be colored by the defendant. The prosecution will now have the practical burden to reverse that coloring effect during direct examination with testimony that will overcome the jury’s presumptions beyond a reasonable doubt.

## 6. Timing the Closing Argument

Sixth and finally, the closing argument should be in the control of the defendant. Given all that has been discussed thus far, this is likely the least

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<sup>137</sup> L. Timothy Perrin, *Pricking Boils, Preserving Error: On the Horns of a Dilemma After Ohler v. United States*, 34 U.C. DAVIS L. REV. 615, 627 (2001) (“The prevailing view, of course, is that the party should draw the sting of the evidence by preemptively disclosing the harmful material and should do so as early as possible.”).

consequential for the defendant. Most, if not all, of the psychological influence will be exhausted. However, if we are to take the United States Supreme Court at its word, that even if “[t]he actual impact of a particular practice on the judgment of jurors cannot always be fully determined, [there is] no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny,”<sup>138</sup> then we must also relinquish the closing order to the discretion of the defendant and his counsel. It is essential to ensure that prosecutors win on proof, and defendants have the tools to create as much reasonable doubt as possible for the prosecution’s proof to be forced to overcome.

### 7. Legal Foundation that Allows for Reform

The lack of a legal foundation allowing for reform is a procedural downfall existing at the federal level and currently present in some states. The power to correct this injustice exists in constitutional law, rules of criminal procedure, state and federal statutes, and state supreme courts. Modification to the Federal Rules of Criminal Procedure does not offend a governmental interest, and thus will likely be resolvable under the Due Process Clause. Nevertheless, the Constitution does not need to be the first or only source of remedy. The federal judiciary could remedy this problem by simply creating a rule of criminal procedure.

States, if the federal change comes by rule, will be individually accountable to modify the current system. Many states have already demonstrated the legislative power to enact such reform by empowering courts to institute changes in which side benefits from the first influence on the jury. For example, Ohio Revised Code § 2315.01 “specifically provides that the court, ‘for special reasons,’ may alter the order of argument otherwise called for under the statute.”<sup>139</sup> This demonstrates the Ohio legislature’s willingness to give the courts discretion to modify trial structure.

Finally, many state constitutions mirror federal constitutional rights. For example, the California Constitution states: “A person may not be deprived of life, liberty, or property without due process of law . . . .”<sup>140</sup> Additionally, state jurisprudence is currently open to such a simple reform in present cases: trial judges have “broad discretion in determining the method by which evidence is brought to the jury’s attention.”<sup>141</sup> These various methods of reform should insulate the proposed change from attacks on jurisprudential concerns about the applicable constitutional principles, while actually protecting criminal defendants in a way we have been claiming to offer procedural protections for years.

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<sup>138</sup> *Estelle v. Williams*, 425 U.S. 501, 504 (1976) (citing *Estes v. Texas*, 381 U.S. 532 (1965); *In re Murchison*, 349 U.S. 133 (1955)).

<sup>139</sup> *Ferguson v. Dyer*, 777 N.E.2d 850, 857 (Ohio Ct. App. 2002); *see also* OHIO REV. CODE ANN. § 2945.10 (West 2006) (providing that a “court may deviate from the order of proceedings” in a criminal trial).

<sup>140</sup> CAL. CONST. art. I, §7(a).

<sup>141</sup> *Commonwealth v. Rancourt*, 503 N.E.2d 960, 966–67 (Mass. 1987) (quoting *Commonwealth v. Amazeen*, 375 N.E.2d 693, 701 (Mass. 1978)).

## IV. CHALLENGES AND RESPONSE

Certainly, an overhaul such as this would be subject to criticism. Psychologically, there are principles that favor the defense in the current system. Also, other legal issues, beyond the presumption of innocence, also arise concerning defendants presenting first. Nevertheless, these principles and legal issues should generally be a strategic decision addressed by defendants on a case-by-case basis, and should not be generically predetermined.

*A. Psychological Challenges to the Proposal*

There are three main psychological factors that reduce or attempt to nullify persuasion attempts implicated in presentation order. First, the psychological “goal of being accurate” is likely the most obvious factor to diminish a juror’s susceptibility to presentation presumptions;<sup>142</sup> after all, jurors, particularly in a criminal case, need to be accurate.<sup>143</sup> Second, the accountability the jury will feel. Finally, the expectancy bias the jury has when entering the room.

Once the social pressure from the judge, lawyers, and other jurors combine with the accountability many jurors feel, primed presumptions may be suppressed by critical analysis motivated by the desire to be accurate.<sup>144</sup> Nevertheless, this critical thinking will begin with the presumption that the prime is accurate, and the mind work focused on supporting that presumption before releasing it.<sup>145</sup> Therefore, if a primed presumption can be formed and accepted, that presumption will be strong unless and until it is overwhelmingly put down both externally by social pressure to be accurate and as an internal result of critical thinking moving away from it. Unfortunately, practices like the “dynamite (*Allen*) charge” pressures jurors to work together to reach a conclusion,<sup>146</sup> thus downplaying the

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<sup>142</sup> MOSKOWITZ, *supra* note 5, at 214.

<sup>143</sup> *See id.*

<sup>144</sup> *See id.* at 414–15.

<sup>145</sup> *See supra* Part II.

<sup>146</sup> In *Allen v. United States*, the Court stated that:

While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions.

164 U.S. 492, 501–502 (1896).

need to be accurate, and encouraging jurors in close cases to latch on to the certainty and comfort provided by presumptions created in presentation order.

Next, accountability is likely to be the most powerful safeguard against presentation order presumptions. People who are told prior to receiving information that they will be held accountable for the way they use it may be immune to presentation order influence.<sup>147</sup> However, jurors are not told this, nor does the system impose accountability on jurors.<sup>148</sup> While one may presume the being on a jury would induce a feeling of accountability, studies have shown that groups of people actually function with a lesser sense of accountability than they otherwise would as individuals.<sup>149</sup> Thus, being part of a jury may reduce accountability and increase a person's susceptibility to presumptions based on presentation order.

Further, accountability and the need to be accurate will be reduced by the expectancy bias jurors bring to the courtroom that a criminal defendant is guilty. When people expect an outcome, they are more likely reach that outcome, unless the person feels that the expected outcome is likely<sup>150</sup> to impact them personally.<sup>151</sup> "Research shows that people can counteract the social judgment effects of their prejudices *if* they are aware of the potential effects of those prejudices and *if* their values or commitments so dictate."<sup>152</sup> Relying on burdening judges with ensuring jurors are aware of prejudices they may or may not have is unfair, inefficient, and unlikely to avoid the constant battles inherent in additional processes for criminal defendants. However, if jurors were somehow made to feel that a conviction was likely to influence them if they were wrong, the personal "outcome-dependence" would induce far more critical analysis of the true guilt.<sup>153</sup> Nevertheless, the system would fail to function if jurors had a vested interest in finding not guilty, so allowing a defendant to change the presentation order is a much better choice to preserve the presumption of innocence.

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<sup>147</sup> MOSKOWITZ, *supra* note 5, at 214.

<sup>148</sup> John D. Jackson, *Making Jurors Accountable*, 50 AM. J. COMP. L. 477, 477 (2002).

<sup>149</sup> E.g. Susan Cunningham, *Genovese: 20 Years Later, Few Heed a Stranger's Cries*, APA MONITOR, May 1984, at 30 (discussing Kitty Genovese, who was stalked and brutally murdered in New York while 38 of her neighbors watched and failed to respond to her screams).

<sup>150</sup> The process of voir dire strives to ensure jurors will not be personally impacted by eliminating relatives, friends, and anyone with a direct or indirect connection with the case.

<sup>151</sup> MOSKOWITZ, *supra* note 5, at 215.

<sup>152</sup> Larry L. Jacoby et al., *Lectures for a Layperson: Methods for Revealing Unconscious Processes*, in PERCEPTION WITHOUT AWARENESS: COGNITIVE, CLINICAL, AND SOCIAL PERSPECTIVES 81, 84 (Robert F. Bornstein & Thane S. Pittman eds., 1992).

<sup>153</sup> *Id.*

*B. Legal Challenges to the Proposal*

Finally, on the legal front, changing the presentation order may have dire implications for the defendant's right to hold the prosecution to the burden of proof. As discussed above, Ohio's legislature has given judges discretion on presentation order. However, it has also used its power to dictate rules for presenting arguments in a trial that courts are either bound to follow or simply choose to follow.<sup>154</sup> One such rule is that the:

Party who would be defeated if no evidence were offered on either side, first, must produce [his] evidence, and the adverse party must then produce [his] evidence. . . . The parties then may submit or argue the case to the jury. The party required first to produce [his] evidence shall have the opening and closing arguments.<sup>155</sup>

Nevertheless, a trial court did not abuse its discretion by allowing a surrebuttal on the part of the defendant in a civil trial.<sup>156</sup> Unfortunately, that was because the appellate court felt that the simple change in the order of presentation and the "restricted scope of the rebuttal" resulted in "little, if any, prejudice."<sup>157</sup>

While this burden of proof is common in all jurisdictions in criminal cases, the balance of the burden of proof and the presumption of innocence should be in the hands of the defendant and her lawyer. Given the unique nature of criminal trials, it is impossible to balance the virtues of a presumption of innocence and the burden of proof with a uniform rule. Thus, our system should give defendants control of the trial structure through the independent options to deliver the first opening statement, present evidence prior to the prosecution's case, cross a prosecution witness before direct, or present the first closing argument.

## V. CONCLUSION

"Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience."<sup>158</sup> The current presentation order, based on reason, detailed psychological analysis, and common human experience, prejudices the defendant. The prejudice can be profound and it is unnecessary. With little cost or state interest affected, courts should begin to offer the defendant the first opportunity to building presumptions for the jury to use in evaluating evidence the State claims establishes guilt beyond a reasonable doubt.

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<sup>154</sup> *Ferguson v. Dyer*, 77 N.E.2d 850, 857 (Ohio Ct. App. 2002).

<sup>155</sup> *Id.* (quoting OHIO REV. CODE ANN. § 2315.01(C), (F)) (alterations in original).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Estelle v. Williams*, 425 U.S. 501, 504 (1976).